Plaintiffs 7

Before the
Federal Communications Commission
Washington, D.C. 20554

09-263

In the Matter of	)	
	)	
SOUTHWESTERN BELL MOBILE SYSTEMS, INC.,	)	
	)	
Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Law Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments.	)	No. 97-31

COMMENTS TO SOUTHWESTERN BELL MOBILE SYSTEMS, INC.'S PETITION FOR DECLARATORY RULING

I. INTRODUCTION

Commentor is Plaintiffs' counsel in a civil action styled Catherine McKay, Lucretia Spencer and Anthony Penrod, on behalf of themselves and all others similarly situated, v. Southwestern Bell Mobile Systems, Inc., a corporation, and Twin Telecom, Inc., a corporation, Defendants, currently pending in the Circuit Court for the Third Judicial Circuit, Madison County, Illinois, Cause No. 96-L-132 ("Illinois class action"). Commentor is also co-counsel in an action styled Andy Sommerman v Southwestern Bell Mobile Systems, Inc., United States District Court of Dallas County, Texas, 134th Judicial District, Cause No. 96-02150.

redress the failure of Petitioner to adequately disclose to its customers (the Illinois and Texas class action putative class members) Petitioner's practice of billing cellular airtime usage to the next higher "one-minute increments." This practice is comm only known as "rounding-up." The subject matter of the class actions is Petitioner Southwestern Bell Mobile System's Inc.'s practice of over-billing by "rounding-up". For example, if a Southwestern Bell Mobile subscriber uses her/his phone for a total of one minute and one second, she/he is billed for a full two minutes. This practice of "rounding-up" is not adequately, fully and conspicuously disclosed to any cellular subscriber in contracts (customer service agreements), monthly billing statements, advertising and marketing materials or brochures or any points of sale. Petitioner's practice of non-disclosure to consumers of this rounding-up billing methodology results in millions of dollars of overcharges by Petitioner to its customers, at the expense of unwary consumers. In other words, cellular consumers do not get the "minutes" that the contracted for at a fixed rate under their service plans and are not billed on a accurate basis for calls beyond the fixed rate time allocated in their service plans.

Petitioner has already argued in United States district courts for the exercise of federal jurisdiction over the Illinois and Texas class actions contending the federal law, specifically the Federal Communications Act, 47 U.S.C. § 151 et seq., completely preempts state law suits challenging the billing practice of common carriers which provide interstate telephone service. In fact, the United States District Court for the

Southern District of Illinois has already held that "this Court is not persuaded that plaintiffs' claims are preempted by federal law." See Order, Judge Paul E. Riley, May 21, 1996. In addition, the U.S. District Court for the Northern District of Texas also held that "the FCA does not preempt the claims at issue in this case" and that "this action arises solely out of other terms and conditions of commercial mobile service and is not preempted by the FCA." See Order, Judge Mary Lou Robinson, August 29, 1996. Further, both the plain language and legislative history of the Federal Communications Act clearly indicate that the statute was not intended to prevent the maintenance of the Illinois class action. On the contrary, the statute contains a savings clause which expressly reserves the right to bring such action. Yet, in the face of the plain language of both the statute, its legislative history as well as both federal and state common law holdings, Petitioners have taken the desperate measure of both upsurping both federal and state courts where actions are currently pending, and seek a declaratory ruling by the Federal Communications Commission in an attempt to avoid, hinder and interfere with the Illinois class action plaintiffs' prosecution of their lawful claims against Petitioner in the court that is currently hearing their claims.

There are numerous lawsuits against other cellular service providers in various federal and state courts throughout the United States. Neither the plaintiffs' attorneys nor their putative class members have received adequate notice of Petitioner's petition and filing before the Federal Communications Commission, and such parties have not been

afforded the opportunity to file comments with the Commission. At the very least, the Commission should extend the time for comment to a period that would allow the plaintiff's attorneys in each case currently pending in any court throughout the country to file their comments with the Commission

II. STATE LAW CHALLENGES TO ROUNDING-UP BILLING PRACTICES ARE NOT PREEMPTED BY § 332(c)(3) OF THE COMMUNICATIONS ACT

Petitioner has taken the quite unusual step of filing a veritable Petition for Declaratory Ruling that its practice of non-disclosure of its true billing practice of rounding-up is lawful, just and reasonable, and that there is complete federal preemption of any state lawsuit challenging its practice. That theory is dead wrong: numerous courts have held that federal law does not preempt claims like Plaintiffs. In order to be completely preemptive of state law, a federal statute must do more than simply preempt state law which is inconsistent with the federal statutory scheme; the federal statute must occupy the entire field of regulation. *Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 2476, 2481, 115 L.Ed.2d 532, 542-43 (1991). Far from occupying the field of regulation at issue in the present case, the federal statute upon which Defendants rely ***expressly preserves*** the kind of state law claims which Plaintiffs have brought.

The statute in question is the Federal Communications Act. The Communications Act, passed in 1934, was enacted to "make available, as far as possible, to all the people of the United States a rapid, efficient, nationwide and worldwide wire and radio service

with adequate facilities at reasonable charges . . ." 47 U.S.C. § 151. To that end, Congress placed common carriers providing interstate telephone service under the jurisdiction of the Federal Communications Commission (the "FCC") and enacted a comprehensive regulatory scheme governing common carriers. For example, carriers are required to furnish telephone service upon reasonable request. § 201(a). They are also required to file tariffs regarding their rates, to charge reasonable rates, and to avoid unreasonable or discriminatory practices. *Id.* § 201-203. Congress also provided a *general* jurisdictional grant for federal courts to adjudicate controversies arising under the Communications Act:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

Id. § 207.

However, the Communications Act also has a "savings clause", which provides that "***nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.***" 47 U.S.C. § 414. (emphasis added). The savings clause thus preserves state law "causes of action for breaches of duties distinguishable from

those created under the Act, as in the case of a contract claim" *Comtronics, Inc. v. Puerto Rico Telephone Company*, 553 F.2d 701, 708 n.6 (1st Cir. 1977); *accord Am. Inmate Phone System, supra*, 787 F.Supp. 852 at 856 (N.D.Ill. 1992) (explaining that the Communications Act does not preempt a state law contract claim where "the duties created by the verbal contract are distinct from the duties created by the Communications Act").

Courts have consistently held that the Communications Act does *not* preempt state court claims for breaches of independent duties that neither conflict with specific provisions of the Act nor interfere with the Act's regulatory scheme. *In re Long Distance Telecommunications Litigation*, 831 F.2d 627, 633 (6th Cir. 1987) (holding that the Communications Act preserved state law claims for fraud and deceit against a telecommunications carrier); *Bruss Company v. Allnet Communication Services, Inc.*, 606 F.Supp. 401, 410-11 (N.D.Ill. 1985) (holding that the Communications Act preserved state common law and statutory fraud claims); *Kellerman v. MCI Telecommunications Corp.*, 112 Ill.2d 428, 493 N.E.2d 1045, 1051, 98 Ill.Dec. 24 (Ill. 1986) (holding that the Communications Act preserved state law claims arising out of defendant's allegedly false advertising practices); *Am. Inmate Phone Systems, supra*, 787 F.Supp. At 856-59 (N.D.Ill. 1992) (holding that the Communications Act preserved state law contract and consumer fraud claims); *Cooperative Communications v. AT&T Corp.*, 867 F.Supp. 1511, 1515-17 (D.Utah 1994) (holding that the Communications Act preserved state law claims for

intentional interference with prospective economic relations, interference with contract, business disparagement, breach of covenant of good faith and fair dealing and unfair competition).

As the foregoing cases demonstrate, the plain purpose of both the Act in general and the savings clause in particular is to preserve the right to bring state court suits, provided that maintenance of such suits does not interfere with the Communications Act's requirement for the provision of uniformly reasonable, non-discriminatory telecommunications service to all Americans. *Comtronics, supra*, 553 F.2d at 708 n.6 (1st Cir. 1977). State lawsuits based upon the breach of duties *not* imposed by the Communications Act, *e.g.*, breach of contract or fraud claims, obviously do not detract from the uniformity of the duties which the Act does impose.

Plaintiffs in the Illinois Class Action are not alleging the breach of any duty imposed by the Communications Act, including the Act's requirement that interstate telephone carriers charge reasonable rates. The Plaintiffs are not challenging the reasonableness of the rates charged by SBMS. The Plaintiffs in the Illinois Class Action are merely challenging only SBMS's deceptive marketing practice of non-disclosure that it would charge more than actual usage time, and that SBMS had every intention of over-charging for time which its customers did not use. As broad as it is, the Communications Act does not purport to regulate specific sales strategies and marketing devices employed by telecommunication carriers. On the contrary, as one district court recently concluded,

> the Communications Act is primarily concerned with the quality, price, and availability of the underlying service. Because allowing Cellular Dynamics to recover damages for any injuries it suffered as a result of MCI's allegedly fraudulent marketing strategies neither conflicts nor interferes with any provision, regulation, or policy underlying the Act, the court finds that plaintiffs' consumer fraud claim is not preempted.

Cellular Dynamics, Inc. v. MCI Telecommunications Corporation, Case No. 94C3126, Northern District of Illinois, 1995 U.S. District Lexis 4798.

In essence, Petitioner's complete preemption argument amounts to an arrogant assertion that the Communications Act gives common carriers like SBMS a federal license to defraud its consumer customers with no fear of exposure under state law. In that vein, Petitioner notes that § 332(c)(3)(a) of the Communications Act states that "no state or local government shall have any authority to regulate the entry or rates charged by any commercial mobile service or any private mobile service." Petitioner's Petition for Declaratory Ruling, page 14, citing 47 U.S.C. § 332(c)(3)(a). SBMS conveniently misleads the Commission that this very provision also explicitly reserves to the states the authority to regulate the "other terms and conditions of commercial mobile services." The House of Representatives Committee on Energy and Commerce, reporting on the House Bill that was incorporated int the amended § 332, emphasizes that even in those areas where state rate regulation is preempted, states nonetheless may regulate other terms and conditions of commercial mobile radio services. The Committee stated:

> **By 'terms and conditions', the Committee intends to**

> **include such matters as customer billing information and practices and billing disputes and other consumer protection matters . . .**

H.R. Report No. 103-111, 103rd Congress, 1st Session at 261 (emphasis added).

Clearly, there is no inconsistency whatsoever between the Communications Act and Illinois Class Action Plaintiffs' state law claim directed to the billing practices of SBMS. Even if there were some such inconsistency, the Federal Communications Act, which expressly preserves the right to pursue state remedies consistent with the Act, obviously does not completely displace state law, as Petitioner inexplicably alleges in its Petition.

III. COMMENTATOR'S CLASS ACTION SUIT CHALLENGES PETITIONER'S FRAUDULENT AND DECEPTIVE PROMOTIONAL AND CONTRACTIVE PRACTICES, NOT PETITIONER'S RATES

Petitioner, through its agents and others, offers consumers a range of cellular service plans. These plans offer a fixed charge per month for a specified period of airtime, e.g., 30 minutes, 60 minutes, or 240 minutes. For any airtime used beyond the fixed-charge allotted under the service plan that the consumer elected and contracted for, then the consumer is charged at various rates "per minute" depending upon the service plan chosen and whether each call is made during peak or off-peak hours. In addition, Petitioner requires that each consumer or customer sign a standardized service agreement. In the service agreement, as well as Petitioner's brochures, promotional and advertising materials, Petitioner routinely represents that the consumer is allowed so many "minutes"

at a fixed monthly charge under the service plan that the consumer selected, and further, that the consumer is billed further and in addition to, each minute of usage over and above the minutes chosen in the service plan. Neither Petitioner nor its agents disclosed the true nature of the billing practices of treating all cellular as being at least one minute in length, of "rounding-up" all calls to the next higher minute, and of treating all cellular calls as separate billing events despite the described "rate plans" which purport to impose one charge for a specified block of time. As a result of Petitioner's deceptive, fraudulent and misleading promotional, advertising, contracting and billing practices as alleged in the class action lawsuits, the plaintiffs and putative class members in those class action lawsuits were overcharged, did not receive the full amount of allocated cellular airtime that they elected under a written contract, and were overcharged for airtime used in excess of the flat-rate amount allocated under the service plans chosen.

Commentors' class action lawsuits challenges Petitioner's fraudulent and deceptive promotional and contracting practices, and not Petitioner's rates charged to its customers. Not only have several federal courts already held that such class action lawsuits do not challenge Petitioner's rates, but Commentor's argument is no more clearly evident than in its class action complaint filed in Illinois state court. In its complaint, Petitioner alleges, among other counts, breach of contract and violation of consumer fraud and deceptive trade statutes. The common questions of law and fact that predominate in the class action lawsuit are: (a) whether Petitioner engaged in deceptive

and unfair business practices and false advertising; (b) whether the advertising, promotional, and sales materials, presentations and contractual documents and other materials used by Petition to market, distribute and sell Petitioner's cellular services misrepresented or omitted material facts; (c) whether Petitioner acted willfully, recklessly, or with gross negligence in omitting to state and/or misrepresenting material facts regarding its billing practice of rounding-up; (d) whether Petitioner violated various state consumer fraud and deceptive trade practice acts; and (e) the nature and extent of damages and other remedies to which the conduct of Petitioner entitles the plaintiffs and class members.

IV. OTHER COMMERCIAL MOBILE RADIO SERVICE PROVIDERS HAVE SETTLED SIMILAR ROUNDING-UP CONSUMER FRAUD AND BREACH OF CONTRACT CLASS ACTION LAWSUITS

While Petitioner seeks to upsurp state and federal court jurisdiction over consumer fraud and breach of contract lawsuits challenging Petitioner's misrepresentation and non-disclosure to consumers of its practice of rounding-up to the next higher minute, other commercial mobile radio service providers have in fact been subjected to the same identical challenges in state courts, and thereafter, entered into global settlement agreements, settling the challenged and disputed practices. *Darryl v. Cohen, et al. v. Airtouch Communications, Inc., et al.*, Superior Court of the State of California, County of San Francisco, Case No. 972438. *Michael Lair and Dave Manweiler v. U.S. West New Vector Group*, Superior Court of the State of Washington Fourteen County, Case No. 95-

2-26309-7. The settlements of both the *Cohen* and *Lair* actions clearly evident that Commentor's legal actions in state court best serve to protect the interests of Commentor and consumers, and that the state court forum is the most practical and most suitable for the legal claims asserted against Petitioner.

V. CONCLUSION

For the foregoing reasons, Commentor requests that the Commission defer any ruling on Petitioner's Request for a Declaratory Ruling until such time as all parties in all currently pending and affected cases have an adequate opportunity to present their comments. In any event, Commentor requests that the Commission rejects each and every one of Petitioner's Requests for Declaratory Ruling as respect to cellular phone users' right to bring lawsuits challenging the inadequate disclosure of the common industry practice of rounding bills up to the next minute increment, rather than charging for actual usage.

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